Filed 12/15/09 1(800)Reminds v. Prosodie Interactive (Canada) CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

1(800)REMINDS, INC., Plaintiff and Appellant, v. PROSODIE INTERACTIVE (CANADA), INC., Defendant and Respondent.	A124889 (Super. Ct. for the City & County of San Francisco No. CGC-08-481880)

Plaintiff 1(800)REMINDS, INC., appeals from the order dismissing its complaint against defendant Prosodie Interactive (Canada), Inc. Plaintiff claims the trial court erred in concluding that the contract between the parties requires its complaint to be tried in Canada. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant is a Canadian corporation with its principal place of business in Calgary, Province of Alberta. The contract at issue was executed by plaintiff's president on June 23, 2006 (the Agreement). The Agreement called for defendant to provide certain technology-related services to plaintiff pursuant to certain terms and conditions, and as set forth in an attached Statement of Work.

The Agreement includes two pages entitled "General Terms and Conditions" that consist of 12 separately numbered paragraphs. Paragraph 4 provides, in part: "Neither party shall be liable to the other in connection with any single event or series of related events for any special, incidental, indirect or consequential loss or damage including, but not limited to, lost profits, lost business revenue, failure to realize expected savings, loss

of data or other commercial or economic loss of any kind even if either party has been advised of the possibility of these losses or damages, and regardless of the form of action, whether in contract or in tort (including negligence) or based upon any other legal or equitable theory." The paragraph concludes "NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, THE MAXIMUM LIABILITY OF THE COMPANY TO THE CUSTOMER, REGARDLESS OF THE CAUSE OR FORM OF ACTION, SHALL BE THE TOTAL AMOUNT PAID BY THE CUSTOMER TO THE COMPANY UNDER THIS AGREEMENT."

Paragraph 7 of the general terms and conditions states: "Time is of the essence in this Agreement. The failure of any party to insist on the strict performance of any of the provisions of this Agreement at any time, or in any one or more instances, or its failure to take advantage of any of its rights hereunder will not be construed as a waiver or relinquishment of any such rights or conditions at any future time, and in no way affects the continuance and full force of all the provisions of this Agreement. *This Agreement shall be governed by the laws of the Province of Alberta, and the federal laws of Canada applicable therein. The company and Customer hereby attorn to the jurisdiction of the courts of the Province of Alberta*." (Italics added.)

On November 14, 2008, plaintiff filed a complaint against defendant, stating causes of action for conversion, fraud, and constructive fraud. Plaintiff alleged that defendant "in an arrangement outside of the duties and subject matter specified in the contract between the Parties signed on or about June 26, 2006, was acting as the Bailee for Plaintiff's copyrighted phone number, 1(800)REMINDS, 1(800) 736-4637, the very heart of Plaintiff's business. On or about December 29, 2007, Plaintiff requested Defendant to return the number but Defendant refused and instead converted it for its own use[.]" Plaintiff further alleged defendant made false representations in the contract with the intent to deceive and defraud. Specifically, it claimed defendant drove it out of business by "not supplying any contracted-for web traffic data . . . ." The website and system prepared by defendant was further alleged to have been defective in several respects, which also led to the demise of plaintiff's business.

On December 18, 2008, defendant appeared specially and filed a motion to dismiss for forum non conveniens under Code of Civil Procedure section 418.10, subdivision (a).[1] In its motion, defendant noted the contract between the parties expressly provides that the agreement is governed by the laws of the Province of Alberta and the federal law of Canada, and that the parties had agreed to the jurisdiction of the courts in Alberta. Defendant contended that the action should be dismissed based on the forum selection clause.

In its opposition, plaintiff claimed the "interplay" between paragraphs 4 and 7 created an "uncertainty of the contract" because, allegedly, under California law damages for intentional torts cannot be contractually limited to the amount of money previously paid for a defendant's services. Plaintiff further claimed it was not suing on the contract. Plaintiff's president and founder (a licensed attorney who is also representing plaintiff in this appeal) submitted a declaration in which he stated he "was confused by the contract because of the limitation of damages in Paragraph 4 and it's [*sic*] interplay with Paragraph 7." He stated he had been an attorney for over 30 years and "was not about to make a fatal error of giving away the corporation I had nurtured for over a decade." The trial court found in favor of defendant and dismissed plaintiff's complaint without prejudice. This appeal followed.

DISCUSSION

I. Standard of Review

There is a split of authority regarding the proper standard of review on a motion to enforce a forum selection clause. (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 7–9 (*America Online*); *Intershop Communications AG v. Superior Court*

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[1] Code of Civil Procedure section 418.10 provides in relevant part: "(a) A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes: [¶] (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her. [¶] (2) *To stay or dismiss the action on the ground of inconvenient forum*." (Italics added.) All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

(2002) 104 Cal.App.4th 191, 198–199 (*Intershop*).) The majority of California courts have reviewed a trial court's decision to enforce a forum selection clause for abuse of discretion. (See, e.g., *Schlessinger v. Holland America* (2004) 120 Cal.App.4th 552, 557; *America Online, supra,* at p. 9; see also *Bancomer, S. A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1457.) At least two California courts, however, have applied a substantial evidence standard of review. (See, e.g., *CQL Original Products, Inc. v. National Hockey League Players' Assn.* (1995) 39 Cal.App.4th 1347, 1354 (*CQL*); *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1680.) In *America Online,* our colleagues in Division Two cogently described the split of authority and persuasively explained the reasons for applying an abuse of discretion standard of review. (*America Online, supra,* at pp. 8–9.) Accordingly, we review the order enforcing the forum selection clause for abuse of discretion.

II. The Trial Court did not Abuse its Discretion in Enforcing the Forum Selection Clause

A. Forum selection clauses are favored

Forum selection clauses such as the one here "play an important role in both national and international commerce" (*Lu v. Dryclean-U.S.A. of California* (1992) 11 Cal.App.4th 1490, 1493 (*Lu*)) and are "usually given effect." (*Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 358.) Although California has a policy favoring access to its courts by its resident plaintiffs, "that policy is satisfied where a plaintiff freely and voluntarily negotiates away his or her right to a California forum. [Citation.] In accord with the modern trend favoring enforceability of forum selection clauses [citations], the Supreme Court [has] held: 'No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length. For the foregoing reasons, we conclude that forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing

that enforcement of such a clause would be unreasonable.' [Citations.[2]] Given the significance attached to forum selection clauses, the courts have placed a substantial burden on a plaintiff seeking to defeat such a clause, requiring it to demonstrate enforcement of the clause would be unreasonable under the circumstances of the case. [Citation.] That is, that the forum selected would be unavailable or unable to accomplish substantial justice. [Citation.] Moreover, in determining reasonability, the choice of forum requirement must have some rational basis in light of the facts underlying the transaction. [Citations.] However, 'neither inconvenience nor additional expense in litigating in the selected forum is part of the test of unreasonability.' [Citations.] Finally, a forum selection clause will not be enforced if to do so will bring about a result contrary to the public policy of the forum." (*CQL, supra,* 39 Cal.App.4th 1347, 1353–1354.)

B. The Agreement's forum selection clause is mandatory

Where a clause in a contract "contains express language of exclusivity of jurisdiction, specifying a mandatory location for litigation" it will be deemed a "mandatory forum selection clause." (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1294 (*Olinick*).) In the present case, plaintiff claims it is a "fiction that the word 'attorn' means mandatory all-inclusive jurisdiction." We disagree.

Notably, the word "attorn" was used in the forum selection clause involved in the *CQL, supra,* case. In language similar to the language of the Agreement, the *CQL* clause stated: " 'This Agreement shall be governed by the law of Ontario, Canada and any claims arising hereunder shall, at the Licensor's election, be prosecuted in the appropriate court of Ontario. *The Licensee hereby attorns to the jurisdiction and judgment of the courts of the Province of Ontario, Canada,* and agrees that a judgment of an Ontario court shall be enforceable in the jurisdiction in which the Licensee is located.' " (*CQL, supra,* 39 Cal.App.4th 1347, 1352.) In *CQL,* the appellate court concluded that "the trial

[2] Citing to *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495–496.

court properly enforced the challenged provision, finding it reasonable and unambiguous." (*Id.* at p. 1355.)

In the present case, the Agreement's forum selection clause provides: "*The company and Customer hereby attorn to the jurisdiction of the courts of the Province of Alberta*." (Italics added.) While plaintiff claims "The use of the word 'Attorn' is not clear or unambiguous for across-the-board mandatory jurisdiction" in Canada, it offers no alternative meaning that one could ascribe to that term other than the parties' intention to have disputes heard in the Alberta courts. This is particularly so in light of the choice-of-law provision that immediately precedes the forum selection clause. The parties expressly agreed that the Agreement would be governed by the laws of Alberta and Canada, not California. That choice supports the conclusion that the parties agreed to litigate in the Province of Alberta, and in no other forum.

C. The contract is not uncertain

Plaintiff argues that the trial court erred in failing to apply Civil Code section 1654, which provides: "In cases of uncertainty not removed by the preceding rules [regarding interpretation of contracts], the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Plaintiff claims paragraphs 4 and 7 together create an uncertainty. As noted above, paragraph 4 specifies: "NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, THE MAXIMUM LIABILITY OF THE COMPANY TO THE CUSTOMER, REGARDLESS OF THE CAUSE OR FORM OF ACTION, SHALL BE THE TOTAL AMOUNT PAID BY THE CUSTOMER TO THE COMPANY UNDER THIS AGREEMENT." Paragraph 7 requires litigation to be conducted in the Alberta courts under Canadian law. Plaintiff claims the contract is uncertain because paragraph 4 "limited jurisdiction in Canada to only unintentional torts due to the damage-limitation cap."

We first observe that there is no language in the agreement that limits Canadian jurisdiction to unintentional torts. Further, as a practical matter, we find it difficult to envision a situation in which the parties to a contract would intentionally draft a forum

selection clause that would require unintentional torts to be heard in one forum and intentional torts in another.

Mr. Kagel, who is the president of plaintiff and the attorney representing plaintiff in these proceedings, claims he subjectively "concluded that the interplay between Paragraphs 4 and 7 only placed unintentional tort jurisdiction in Canada because, if 100% of all possible causes of action are saddled with a damage-limitation cap, the Canadian court would not have the discretion to award damages for actual and punitive damages for intentional torts which left [plaintiff] free to bring intentional tort causes of action in California." However, a party's unstated, subjective intent is irrelevant when considering the terms of a contract: "It is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation." (*Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.* (1985) 164 Cal.App.3d 1122, 1127.) Thus, under California law, "it is now a settled principle of the law of contract that the undisclosed intentions of the parties are . . . immaterial; and that the outward manifestation or expression of assent is controlling." (*Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 133.)

The contract at issue is clear on its face, including paragraphs 4 and 7 of the terms and conditions. While plaintiff claims that "[t]o interpret the contract differently [from Kagel] would be to create a license to steal," the most logical interpretation of the two paragraphs is that plaintiff, in agreeing to accept the benefits of the contract, agreed to give up its right to collect damages for any claim in excess of the contracted-for amounts, and agreed that all contractual-related disputes would be resolved in Canada. Our interpretation is even more reasonable in light of the fact that, as plaintiff admits, Kagel is a licensed attorney and presumably could have sought to modify the agreement to resolve the "license to steal" issue by seeking an explicit modification of the forum selection

clause.[3] As the contract stands now, paragraph 4 does nothing to alter the choice of forum stated in paragraph 7.[4]

D. The forum selection clause is not unfair or unreasonable

" 'Although not even a "mandatory" forum selection clause can completely eliminate a court's discretion to make appropriate rulings regarding choice of forum, the modern trend is to enforce mandatory forum selection clauses unless they are unfair or unreasonable. [Citations.] . . . [¶] If there is no mandatory forum selection clause, a forum non conveniens motion "requires the weighing of a gamut of factors of public and private convenience . . . ." [Citation.] *However if there is a mandatory forum selection clause, the test is simply whether application of the clause is unfair or unreasonable*, and the clause is usually given effect." (*Olinick, supra*, 138 Cal.App.4th 1286, 1294.) In deciding whether enforcement of a forum selection clause is reasonable, the sole issues are whether the forum is available, capable of deciding the case, and rationally related to the transaction. (*Intershop, supra,* 104 Cal.App.4th 191, 199.)

Additionally, in determining the reasonableness of a contractual forum selection clause, we may consider whether: the plaintiff is a sophisticated and experienced businessperson; the plaintiff had the power to walk away from the negotiations if displeased with the contractual forum selection clause; the defendant is domiciled or based in the selected forum. (*CQL, supra,* 39 Cal.App.4th 1347, 1355.) A contractual forum selection clause is rationally related to the home country of a defendant that

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[3] Without providing a citation to the record, plaintiff claims the court "severed" paragraph 4 from the agreement in making its ruling. We have read the transcript of the hearing on defendant's motion to dismiss. At no time did the trial court indicate that it was severing any portion of the contract.

[4] Unlike plaintiff, we do not believe that the language of paragraph 4 would induce a reasonable person to enter into the contract based on the belief that jurisdiction for intentional torts would lie in California.

conducts business in other countries. (*Ibid.*; *Lu, supra,* 11 Cal.App.4th 1490, 1493–1494, fn. 2.)[5]

Plaintiff was represented by Kagel during the contract negotiations with defendant. Thus, it is reasonable to treat plaintiff as a sophisticated and experienced business entity. There is no evidence that plaintiff did not have the power to walk away from the agreement when presented with the forum selection clause. Further, it is uncontested that defendant is domiciled in Alberta, Canada.[6] "Presumably, 'a party which has contracted away its right to choose its home forum (as well as all the concomitant conveniences of a home forum) has . . . done so because the value it receives from the negotiated deal is worth the chance the party may be required to litigate disputes elsewhere.' [Citation.]" (*CQL, supra,* 39 Cal.App.4th 1347, 1355.)

While plaintiff claims the damage-limitation cap for intentional torts is legal in Canada, and that defendant has admitted as much, it cites to no Canadian law on this point. In any event, this argument relates more to the choice-of-law provision in paragraph 7, not the forum selection clause. Plaintiff has presented no other grounds to show that enforcement of the forum selection clause would be unreasonable, i.e., it has not shown that the Canadian forum is unavailable or would be "unable to accomplish substantial justice in resolving this dispute." (*CQL, supra,* 39 Cal.App.4th 1347, 1358.) Because it failed to carry its burden of proving that enforcement of the forum selection clause would be unreasonable under the circumstances of this case, we conclude the trial court did not abuse its discretion in finding it to be enforceable.

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[5] Thus, in *CQL, supra,* a licensing agreement required the licensee to litigate any claims against the licensor in Ontario, Canada, where the licensor had its principal office. The appellate court found the choice-of-forum provision was reasonable and enforceable because it protected the licensor from being confronted by a myriad of different state and national forums. (*CQL, supra,* 39 Cal.App.4th 1347, 1355.)

[6] Plaintiff claims defendant maintains an office in San Francisco. It offers no evidence to support that assertion other than a statement made in Kagel's declaration, which was included in its opposition to defendant's motion to dismiss. Regardless, the presence of a single office does not, by itself, suggest that defendant is other than a Canadian corporation.

E. The forum clause does not violate public policy

Plaintiff correctly notes California courts do not enforce forum selection clauses if enforcement will frustrate public policy. (*America Online, supra,* 90 Cal.App.4th 1, 12 [refusing to enforce forum selection clause that would waive nonwaivable protection under California Consumers Legal Remedies Act (Civ. Code, § 1751) (CLRA)]; *Wimsatt v. Beverly Hills Weight etc. Internat., Inc.* (1995) 32 Cal.App.4th 1511, 1520–1521 [same for California's Franchise Investment Law (Corp. Code, § 31000 et seq.)]; *Hall v. Superior Court* (1983) 150 Cal.App.3d 411 [same for provisions of California Securities Law of 1968 (Corp. Code, §§ 25700, 25701)].) When a forum selection clause arguably threatens a public policy, the party trying to enforce the clause bears the burden of showing the other forum will honor that public policy. (*America Online, supra,* at pp. 10–11.)

America Online involved a choice of law and a forum selection clause in an internet company's subscriber agreement. The chosen state did not allow consumer lawsuits to be brought as class actions. (*America Online, supra,* 90 Cal.App.4th 1, 4–5.) The appellate court explained that California courts will not defer to a choice-of-law clause where doing so "would substantially diminish the rights of California residents in a way that violates our state's public policy." (*Id.* at p. 12.) The court relied on two sources of public policy in refusing to enforce a Virginia choice-of-law clause: (1) the CLRA contains an express provision voiding any attempted waiver of rights under the CLRA as contrary to public policy; and (2) enforcing the choice-of-law clause would violate "an important public policy underlying California's consumer protection law" because Virginia law prohibits consumer class action lawsuits and thereby diminishes the rights of consumers. (*America Online, supra,* at pp. 4–5.)

No such weighty interests are advanced by plaintiff here. Plaintiff simply states, in a conclusory fashion, "What could be more fundamental than stopping a business entity, while doing business in California, from committing fraud and conversion and then hiding behind an alleged Canadian selection-of-law provision that prohibits an award of actual or punitive damages?" In the first place, plaintiff does not cite to any

authority for the proposition that Canadian courts are required to enforce contractual damages limitations in cases involving intentional torts. Secondly, plaintiff has not demonstrated how this relatively ordinary private business dispute impacts the public policy of this state.

Finally, even if plaintiff is correct that the courts in Alberta will enforce the damages limitation clause, the fact that an alternative forum affords a plaintiff less favorable law than California "should not be accorded any weight in deciding a motion for forum non conveniens provided, however, that some remedy is afforded." (*Stangvik v. Shiley* (1991) 54 Cal.3d 744, 754, fn. 5.) "[A] forum is suitable where an action 'can be brought,' although not necessarily won." (*Shiley Inc. v. Superior Court* (1992) 4 Cal.App.4th 126, 132 [a state that does not recognize a cause of action may still be a suitable forum].) Plaintiff has not carried its burden of proving Alberta is not a suitable place for trial.

F. The dispute arises out of the contract

Plaintiff appears to concede that its claims for fraud and conversion of its trade secretes are subject to dismissal because they arose in connection with the inducement to sign and the signing of the contract. It claims, however, that the claim for conversion of the 1(800)REMINDS phone number is an "independent tort" and not subject to dismissal because the wrongful conduct occurred after the contract was signed. We disagree.

Forum selection clauses can be equally applicable to contractual and tort causes of action. Whether a forum selection clause applies to a tort cause of action depends on whether adjudication of the tort claim requires interpretation of the contract. (*Bancomer, S. A. v. Superior Court, supra,* 44 Cal.App.4th 1450, 1461; *Manetti-Farrow, Inc. v. Gucci America, Inc.* (9th Cir. 1988) 858 F.2d 509, 514.) Here, the alleged conversion occurred during the performance of the contract and adjudication of this claim would require interpretation of the contract in order to ascertain whether defendant's conduct was wrongful. Thus, all of plaintiff's causes of action arise out of the Agreement and are subject to the forum selection clause. The trial court did not abuse its discretion in dismissing this action in favor of the contractually agreed-to forum.

DISPOSITION

The dismissal order is affirmed.

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Dondero, J.

We concur:

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Margulies, Acting P. J.

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Banke, J.